U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 October 2006

CASE NO.: 2005-LHC-1554

OWCP NO.:10-040163

In the matter of

J.I.S.,
Claimant

v.

MCGINNIS, INC.,
Employer

and

SIGNAL MUTUAL INDEMNITY ASSN. LTD.,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest

APPEARANCES:

Stephen P. Moschetta, Esquire
For the Claimant

Scott A. Soule, Esquire
For the Employer

BEFORE: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim for medical benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et. seq*. ("Act") and the implementing regulations, 20 C.F.R. parts 701 and 702 ("Regulations"). The Act provides

compensation and medical benefits to certain employees engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring upon the navigable waterways of the United States or certain adjoining areas, resulting in disability or death. With limited exceptions, the Act provides the exclusive remedy for such injuries against maritime employers that have secured the payment of benefits. See 33 U.S.C. § 905(a).

PROCEDURAL HISTORY[1]

The Claimant filed his claim on March 1, 2005. The Claimant is seeking benefits for psychiatric treatment for an injury sustained on April 28, 2003. On April 22, 2005, the Director, Office of Workers' Compensation Programs ("OWCP") referred the case to the Office of Administrative Law Judges ("OALJ"). The case was assigned to me on February 17, 2006.

I conducted a formal hearing on July 10, 2006, in Charleston, West Virginia, in which the parties were given a full and fair opportunity to present evidence and argument. No appearance was entered for the Director, OWCP. At the hearing, I admitted ALJ EX 1, CX 1-11 and 17-22,[2] and EX 1-11 and 13[3] into evidence.[4] The Claimant and Employer have each submitted closing briefs.

I. STIPULATIONS

The parties stipulate and I find:

A. The Claimant sustained an accidental injury, on or about April 28, 2003, while employed as a laborer/welder with the Employer.

B. Employer received timely notice of the injury within the meaning of § 12, on April 28, 2003.

C. The injury was in the course and scope of Claimant's employment with the Employer.

D. An employer-employee relationship existed at the time of the injury.

E. The Employer is properly named as potentially liable.

F. The Claimant is covered by the Act and the Act applies to this proceeding.

G. The Claimant was first treated for his condition on April 28, 2003 at St. Mary's Hospital in Huntington, West Virginia, where he remained on an in-patient basis until

[1] The following references will be used: "TR" for the official hearing transcript; "ALJ EX" for an exhibit offered by this Administrative Law Judge; "CX" for a Claimant's exhibit; "DX" for a Director's exhibit; and, "EX" for an Employer's exhibit.

[2] The Claimant withdrew the exhibits previously proffered as CX 12 and 16. (TR 6).

[3] The Employer withdrew the exhibit previously proffered as EX 12. (TR 10).

[4] At the hearing, I also granted Employer's request to conduct a post-hearing deposition of Dr. Bobby Miller and submit the transcript into evidence. (TR 9). Employer was afforded thirty days after the hearing to submit the deposition transcript. (TR 186). However, no such transcript has been received by this Court by that deadline.

being discharged on May 31, 2003.

H. The Claimant was released to work and did, in fact, return to work in October 2004. He has continued to work on a sporadic basis for various employers from that time through the present.

I. Claimant's Average Weekly Wage ("AWW") is $407.25.

J. Claimant's Compensation Rate (AWW x 2/3) is $271.50.

K. An Informal Conference was held on June 3, 2004.

II. ISSUES

A. Whether the Claimant sustained a psychiatric or emotional injury as a result of the work accident on April 28, 2003?

B. Whether psychiatric treatment is compensable under § 7 of the Act?

III. FINDINGS OF FACT

A. BACKGROUND

The Claimant is 23-years-old and a resident of Greenup, Kentucky. (TR 18). He graduated from high school in 2001. (TR 19). Thereafter, he attended Ashland Vocational School for training in welding. The record conflicts as to whether the Claimant attained a certificate in welding as a result of this training. (*Compare* EX 3 at 1 & TR 19-20). While working on barge for the Employer, the Claimant fell approximately 15 feet, landing on the deck of the boat. (CX 1). The Claimant cannot recall the details of the accident.

B. CLAIMANT'S EVIDENCE

Claimant's Testimony

The Claimant testified that prior to the accident, he had never been treated for anxiety, depression, or anger issues. (TR 24). He stated, though, that afterward, he began having difficulty coping emotionally with the accident. (TR 26). Specifically, he reported feeling depressed, considering suicide, and experiencing unexplained anger. (TR 26). He also testified that he has experienced sleeping problems since the accident. (TR 27). The Claimant also testified as to antisocial tendencies that he has exhibited since the accident. (TR 34-35). He reported recent frequent forgetfulness. (TR 42). He also stated that he feels angst when seeing the Ohio River, the site of the accident. (TR 45). The Claimant stated that he is amenable to treatment for emotional problems. (TR 47).

During a May 24, 2006 deposition, the Claimant testified that after the accident, he worked briefly at an armory and did some intermittent welding jobs. (EX 10 at 11-12). He also

worked as a general laborer. (EX 10 at 24). During this time, the Claimant also took vocational coursework for which he was responsible for the tuition. (EX 10 at 26). He has also attended a master logging class through the University of Kentucky and engaged in minimal employment as a result. (EX 10 at 47-49). At the time of the proceedings, the Claimant testified that he had recently joined the boilermakers union but was not currently working. (EX 10 at 15). At the hearing, he testified that he is ready, willing, and able to return to work. (TR 89).

The Claimant also testified as to his hobbies and activities in which he has engaged since the accident. He frequently hunts and fishes. (EX 10 at 40-41; TR 80-81). He has recently purchased a boat and hunting equipment. (TR 81). He has also recently purchased a new motorcycle for recreational purposes. (EX 10 at 59-60).

Other Witness Testimony

The Claimant's father, testified about behavioral changes he has observed in his son since the accident. He stated that prior to the accident, the Claimant loved animals but recalled an incident afterward where the Claimant became violent toward a dog. (TR 108). He also testified as to the Claimant's recent forgetfulness and propensity for misplacing items. (TR 109-110). He reported that the Claimant has exhibited difficulties sleeping since the accident (TR 111), though he noted that his sleeping has improved "somewhat" over time. (TR 115). He also testified that the Claimant has displayed a temper since the accident. (TR 112).

The Claimant's seventeen-year-old brother, offered similar testimony. He stated that since the accident, the Claimant becomes easily angered. (TR 123). He also testified about the Claimant's frequent forgetfulness. (TR 123-124). On cross-examination, the witness stated, however, that he has no hesitation riding in a car driven by the Claimant or hunting with him. (TR 126-129).

A friend of the Claimant's since the seventh or eighth grade, also offered testimony. He stated that he has noticed changes in the Claimant's behavior since the accident. (TR 131). He testified that the Claimant is now easily angered by matters that previously would not have bothered him. (TR 132). He also recalled an occasion when the Claimant became demonstratively agitated upon seeing the Ohio River. (TR 133). On cross examination this witness also testified that he has no trepidation hunting or fishing with the Claimant, or riding in a vehicle driven by him. (TR 138).

The Claimant's mother, also testified as to the Claimant's behavioral changes since the accident. She stated that, generally, her son was a happy person before the accident, but is now snappy and irritable. (TR 146). She also testified as to his propensity for losing his personal items. (TR 146). She also testified that since the accident, the Claimant has had sleeping difficulties, including yelling and thrashing while asleep. (TR 149).

The Claimant's ex-girlfriend, also offered testimony. She testified that she knew the Claimant before the accident, but that the two began dating afterward. (TR 168). She described him as a happy person before the accident but serious and moody since. (TR 168). She stated that the Claimant thrashed and kicked while asleep. (TR 169). She also testified as to his

forgetfulness. (TR 170).

Hospital and Treatment Records

The Claimant submitted records from St. Mary's Medical Center for treatment in connection with the accident. (CX 1). The records cover the time period from April 28, 2003-May 31, 2003. The records document the Claimant's workplace fall and resulting bilateral pain, wrist pain, and head pain. (CX 1 at 1). Upon admittance to the Emergency Room, the Claimant was described as having blood covering his face and was combative and uncooperative with staff. (CX 1 at 3). The Claimant spent the period from April 28, 2003-May 31, 2003 in the intensive care unit where he was on a ventilator. (CX 1 at 2). He then participated in physical and occupational therapy. (CX 1 at 2). He continued his rehabilitation at King's Daughters Medical Center upon his discharge from St. Mary's. (CX 1 at 2).

The Claimant has submitted the treatment records of Dr. Luis Bolano, the orthopedic surgeon who provided treatment at St. Mary's. (CX 2). These records document treatment from the time of the Claimant's hospitalization through May 5, 2004. On April 30, 2004, Dr. Bolano diagnosed the Claimant with an unstable displaced distal radius fracture and recommended operative treatment. (CX 2 at 23). Dr. Bolano performed the surgery on April 30, 2003 and reported post-operative diagnoses of bilateral distal radius fracture and right ulnar shaft fracture. (CX 2 at 21). Dr. Bolano also performed surgery on the claimant's wrist on November 18, 2003. (CX 2 at 19). In the subsequent follow-up evaluations, Dr. Bolano reported that the Claimant showed improved range of motion but moderate wrist symptoms. (CX 2 at 13-17). Finally, included in these records is a September 25, 2003 Physical Work Performance Evaluation Summary that concludes overall that the Claimant is capable of sustaining a medium level of work. (CX 2 at 6).

The Claimant has also submitted the treatment records from King's Daughters Medical Center, which span May 31, 2003-June 10, 2003. (CX 3). The records document rehabilitation and aftercare associated with a traumatic fracture of bone and an unspecified head injury. (CX 2 at 2). The records state that the Claimant progressed well with his therapy and at the time of discharge, was mobile without supervision. (CX 2 at 3). The records also documented evidence of possible frontal lobe damage and a recommendation for a full neuropsychological evaluation. (CX 2 at 3).

The Claimant submitted records of treatment for a complaint of nearsightedness in which his accident and resulting injuries were referenced. (CX 8).

The Claimant has submitted records dated March 7, 2004 from Our Lady of Bellefonte Hospital, documenting an emergency room visit for pain and swelling in his right hand. (CX 19). The report lists the cause of the injury as the result of horseplay between the Claimant and a friend. (CX 19 at 1). At the hearing, the Claimant testified that the injury was actually caused by his hitting a wall while having a violent dream. (TR 28-29). He testified that he reported the cause to be horseplay because he feared that if he reported the true reason, he would be sent to a mental institution. (TR 29). As a result of the injury, the Claimant was placed in a splint and given a prescription for pain control. (CX 19 at 2).

Physician Opinions

Dr. Scott Lance, who is Board-certified in General and Forensic Psychiatry (CX 11), examined the Claimant or complaints of anxiety on June 11, 2004.[5] The Claimant submitted his report into evidence. (CX 4). Dr. Lance stated that the Claimant noticed the onset of nightmares and feeling restless, worried, and upset toward the end of his hospitalization. (CX 4 at 1). The Claimant also reported to Dr. Lance that he has developed a fear of heights, is avoidant, and has "basically stopped doing things." (CX 4 at 1). Dr. Lance diagnosed the Claimant with post-traumatic stress disorder. (CX 4 at 1-2). He recommended additional treatment and prescribed a low dose of Elavil. (CX 4 at 2). He reported that the Claimant consented to the plan. On June 26, 2006, Dr. Lance stated that he no longer wished to treat the Claimant due to his involvement with this litigation. (CX 21).[6]

The Claimant submitted the January 29, 2004 report of Dr. Joseph Frazier, DMD, which summarized a January 22, 2004 oral examination. Dr. Frazier reported that the Claimant's accident resulted in a knocked out tooth and a fractured jaw. (CX 6 at 1). Dr. Frazier reported that ¾ of the space for this missing tooth was gone and recommended an orthodontic consultation to address this problem.

The Claimant submitted the June 7, 2006 report of Dr. Bobby Miller, who examined the Claimant on June 5, 2006. (CX 7).[7] Dr. Miller is Board-certified in Psychiatry and Forensic Psychiatry and Board-eligible in Neurology. (CX 10). Dr. Miller based his evaluation on an interview with the Claimant, a collateral interview with the Claimant's girlfriend, hospital and treatment records connected to the accident, Dr. Lance's psychiatric evaluation, Mr. Given's report, and correspondence and documentation of the accident. (CX 7 at 2). Based upon this review, Dr. Miller concluded that the Claimant meets the criteria for: (1) Post-traumatic stress disorder; (2) Dysthymic disorder; (3) Personality change due to cerebral concussion; and (4) Post-traumatic headache. He also opined that these diagnoses are a consequence of his accident. (CX 7 at 1). Dr. Miller commented that the Claimant's overall condition that resulted from the accident has improved; however, he continues to exhibit residual problems from his brain injury. (CX 7 at 13). Dr. Miller projected a treatment plan of three years, which would involve psychiatric services and medication. He also stated that the Claimant would benefit from psychotherapy and marital/family therapy. (CX 7 at 13-14). Dr. Miller also stated that in the event the Claimant does not show improvement from this plan, the necessity for treatment may become lifelong. (CX 7 at 14).

On June 19, 2006, Dr. Miller stated in a letter to Claimant's counsel that he would be willing to provide treatment to the Claimant. (CX 20).

[5] Dr. Lance reported that the Claimant self-referred.
[6] Dr. Lance was deposed on May 24, 2006. The Employer submitted the transcript of this deposition and it is summarized in "Employer's Evidence," *infra*.
[7] Dr. Miller indicated that the Claimant was referred for examination by his attorney. (CX 7 at 1).

On July 6, 2006, Dr. Miller authored a report critiquing the evaluation of the Claimant by Dr. Douglas Ruth. (CX 22)[8] This report offered a comparative analysis of Dr. Miller's June 7, 2006 report and Dr. Ruth's June 27, 2006 report, with respect to the Claimant's condition. Dr. Miller pointed out that he and Dr. Ruth agree that the Claimant suffered a concussion resulting from his injury. (CX 22 at 2). However, he identified nine points of disagreement:

(1) Issues of malingering. Dr. Miller cited Dr. Ruth's comments that the Claimant may have overstated his pre-injury mental capacity, thereby exaggerating the effect of the injury. To counter, Dr. Miller cited the results of clinical testing that fails to demonstrate malingering. (CX 22 at 2).

(2) The Claimant's level of premorbid functioning and its relevance to his current situation. Dr. Miller stated that Dr. Ruth's comment concerning the Claimant's ability to function post-injury is less relevant than his own observations concerning changes in the Claimant's personality and behavior. (CX 22 at 3).

(3) The Claimant's current psychiatric disability. Dr. Miller quoted Dr. Ruth's conclusion that the Claimant did not evidence a psychiatric impairment due to his injury. He countered by pointing out Dr. Ruth's diagnosis of post-traumatic stress disorder as well as his own diagnosis of that disease based on objective data. (CX 22 at 3). Dr. Miller also noted that his testing revealed the Claimant's post-traumatic stress disorder to be "moderate to severe," in contrast to Dr. Ruth's assertion that the intensity of the disorder is mild. (CX 22 at 4).

(4) Whether the Claimant has denied or minimized psychiatric symptoms. In response to Dr. Ruth's assertion that the Claimant denied or minimized having psychiatric symptoms, Dr. Miller cited quotations from his report where the Claimant describes symptoms. (CX 22 at 4).

(5) Whether Dr. Ruth omitted other diagnoses related to the Claimant's injury from consideration. Dr. Miller contended that Dr. Ruth did not diagnose or comment on the Claimant's personality changes, post-traumatic headaches, or chronic mood disorder. (CX 22 at 4-5).

(6) Whether the Claimant has experienced resolution and/or improvement of certain symptoms. Dr. Miller disagreed with Dr. Ruth's opinion that some of the Claimant's symptoms have resolved and others have improved. He noted that Dr. Ruth examined the Claimant less than two weeks after he did and contended that this is an insufficient amount of time for resolution or improvement of symptoms that he noted in his own examination. (CX 22 at 6).

(7) The extent of Dr. Ruth's psychological evaluation. Dr. Miller criticized the extensiveness of the objective testing that Dr. Ruth conducted. He also pointed out instances where the results of Dr. Ruth's testing supported a finding of depression and symptoms related to traumatic events. (CX 22 at 6-7).

[8] The Employer has submitted the June 27, 2006 report of Dr. Ruth as EX 9. For a summary of Dr. Ruth's report, see *infra* "Employer's Evidence."

(8) The sufficiency of the record upon which Dr. Ruth premised his opinion. Dr. Miller criticized Dr. Ruth for not conducting collateral interviews as part of his evaluation of the Claimant. (CX 22 at 7).

(9) Whether the Claimant is currently in need of treatment. Dr. Miller characterized the Claimant's condition as "chronic" due to the passage of time and reiterated that treatment would be beneficial. (CX 22 at 7-8).

Based on this comparative analysis, Dr. Miller reiterated his conclusion that the Claimant continues to experience "important residual problems" from his brain injury, specifically changes in his personality and behavior. (CX 22 at 8). Dr. Miller also contended that the Claimant's post-traumatic stress disorder, mood disorder, and post-traumatic headache exacerbate this problem. (CX 22 at 10). Dr. Miller conceded that the Claimant's condition has improved, but it still impacts his daily life. (CX 22 at 10). As a result, Dr. Miller also reiterated his call for treatment, as described in his earlier report. (CX 22 at 8).

Vocational Evidence

The Claimant has submitted an April 6, 2004 Vocational Assessment conducted by William Given, a psychologist. (CX 5). Mr. Given interviewed the Claimant, performed a variety of tests, and conducted two job matching exercises. (CX 5 at 1). He concluded that the Claimant's effort and motivation was strong, his intellectual functioning is average, his spatial and form perception is strong, and his vocational interests are not highly differentiated. (CX 5 at 8). Mr. Given also concluded that the Claimant's test patterns are highly suggestive of learning disabilities. (CX 5 at 8). Finally, Mr. Given found his interview of the Claimant to reveal a number of symptoms strongly suggestive of psychiatric disorder, namely post-traumatic stress disorder and /or depression. (CX 5 at 9). Accordingly, Mr. Given recommended further psychiatric evaluation to determine if the Claimant's symptoms would interfere with a current work effort. (CX 5 at 9).

C. EMPLOYER'S EVIDENCE

Witness Testimony

Russell Painter, an insurance and claims manager with McGinnis, Inc., testified on behalf of the Employer. He testified as to the Claimant's employment record. Specifically, he testified that the Claimant was reported for sleeping on the job. (TR 179). He also reported that the Claimant had been caught welding while sitting on a gas can. (TR 179-180). He testified that he was made aware that the Claimant inquired about re-employment with the Employer after the accident. (TR 182).

As noted above, the Employer submitted the transcript of Dr. Lance's May 24, 2006 deposition. (EX 7). During that testimony, Dr. Lance reiterated the information and conclusions presented in his June 11, 2004 report. Specifically, he reiterated his diagnosis of post-traumatic stress disorder, which he characterized as a "working diagnosis." (EX 7 at 16). He also testified in some detail as to the information he considered in arriving at his conclusions. Dr. Lance did

not review any medical records in preparation for his report. (EX 7 at 7). He did perform a mental status examination and reported that the Claimant's results were not grossly abnormal. (EX 7 at 12). He did not perform a malingering test as he was "struck" by the Claimant's lack of endorsement of symptoms. (EX 7 at 13). Dr. Lance indicated that he did not perform any other test as this was the Claimant's initial visit. (EX 7 at 12). Dr. Lance stated, therefore, that his findings were based exclusively on what the Claimant told him. (EX 7 at 13). Finally, Dr. Lance reported that the Claimant had scheduled a follow-up appointment but cancelled because he could not get coverage for his condition. (EX 7 at 20).

The Employer submitted the deposition testimony of Dr. Bolano. (EX 8). Dr. Bolano briefly summarized the treatment he provided to the Claimant, namely a surgical procedure to repair fractures to the wrist areas. (EX 8 at 8). Dr. Bolano reported that the surgery went well. (EX 8 at 8). With respect to psychiatric issues, Dr. Bolano recalled that the Claimant reported that he was experiencing flashbacks and nightmares. (EX 8 at 8-9). Dr. Bolano also provided some treatment to the Claimant following his March 7 2004 hand injury. (EX 8 at 9). That treatment ended when the Claimant's fractures healed. (EX 8 at 11). On July 5, 2004, Dr. Bolano authored a letter in which he stated his belief that the Claimant had reached maximum improvement and should have a final impairment rating. (EX 8 at 12). At the time of the deposition, Dr. Bolano stated that the Claimant is limited to a medium duty position. (EX 8 at 15).

Physician Opinions

The Employer submitted the June 27, 2006 report of Dr. Douglas Ruth, who examined the Claimant on June 19, 2006. (EX 9). Dr. Ruth is Board-certified in Psychiatry and Forensic Psychiatry. (EX 9 at 1).[9] In addition to the examination, Dr. Ruth reviewed various records of hospitalization and treatment, the Claimant's academic transcripts, the reports of Dr. Lance, Dr. Miller, and Mr. Given, and the deposition transcripts of Dr. Lance, Dr. Bolano, and the Claimant. (EX 9 at 7). Based on this review, Dr. Ruth diagnosed the Claimant with post-traumatic stress disorder. (EX 9 at 3). However, he characterized the intensity of this disorder as "quite mild" and stated that some of its symptoms have resolved and others have improved. (EX 9 at 1). To that end, Dr. Ruth reasoned that the Claimant's symptoms do not interfere with his interests or activities. (EX 9 at 1). Dr. Ruth also discounted the Claimant's complaints of memory impairment, citing a lack of objective findings to support such a diagnosis. (EX 9 at 2). Dr. Ruth stated that the Claimant's remaining symptoms are not of sufficient intensity to require psychiatric intervention. (EX 9 at 3). Moreover, Dr. Ruth opined that the Claimant is on the track of progressive improvement for post-traumatic stress disorder, which he has accomplished with minimal psychiatric intervention. (EX 9 at 3).

Hospital and Treatment Records

The Employer submitted records documenting the Claimant's treatment in the emergency room on March 7, 2004. (EX 2). These records include those submitted by the Claimant as CX 19 concerning the same treatment, as well as additional documents. Similar to those submitted by the Claimant, these records detail the asserted cause and prescribed course of treatment for the

[9] Dr. Roth indicated that he examined the Claimant at the request of the Employer's attorney. (EX 9 at 1).

Claimant's hand injury. They also report findings of a comminuted fracture of the distal 4th and 5th metacarpal of the right hand. (EX 2 at 10).

These records also document a September 2, 2005 visit by the Claimant to the emergency room for back pain. (EX 2 at 11). The records reflect that the Claimant did not stay to have an X-ray performed. (EX 2 at 12).

Other Evidence

The Employer submitted the Claimant's academic records from both Ashland Technical College and Greenup County High School. (EX 3). These records include the Claimant's certificate in Welding Technology. (EX 3 at 1). They also include his high school diploma and transcript, the latter of which lists his high school grade point average as 1.9250. (EX 3 at 8).

IV. DISCUSSIONS OF FACT CONCLUSIONS OF LAW

An injured person must satisfy four elements in order to receive compensation under the Act. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 45 (1989). First, the person must be injured in the course of employment. 33 U.S.C. § 902(2). Next, the employer must have employees engaged in maritime employment. 33 U.S.C. § 902(4). Third, the injured person must have "status," that is, be engaged in maritime employment. 33 U.S.C. § 902(3); *Director, OWCP v. Perini N. River Assocs*., 459 U.S. 297, 317 (1983). Finally, the injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a). This last element is the "situs" test. *Schwalb*, 493 U.S. at 45.

It is well established that, in arriving at his or her decision, an Administrative Law Judge is entitled to evaluate the credibility of all witnesses and to draw his or her own inferences and conclusions from the evidence. *Quinones v. H.B. Zachery, Inc.* 32 BRBS 6 (1998). Accordingly, the Administrative Law Judge's credibility determinations will not be disturbed unless they are inherently incredible or patently unreasonable. *Id.; Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

It has been consistently held that the Act must be construed liberally in favor of claimants. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J. B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967).

In this case, the parties have stipulated, and I find, that the Claimant is covered by the Act. (ALJ EX 1). Therefore, he may receive compensation under the Act, provided that he satisfies the applicable requirements.

A. JURISDICTION[10]

A party seeking benefits under the Act has the burden of establishing jurisdiction. *Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, *aff'g* 990 F.2d 730 (3d Cir. 1993).[11] In order for a claimant to be eligible for benefits, the Act, as it was amended in 1972, required an injured worker to qualify under both a "situs" and a "status" test. *Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979).

Maritime workers are thus permitted to collect benefits under the Act, even if they are injured on land, so long as they meet the following tests:

> (1) *Status* - the worker must be a maritime employee, such as a longshoreman, shipbuilder, or ship repairman engaged in loading, unloading, constructing, or repairing a vessel of at least eighteen net tons in size. *See* 33 U.S.C. § 902(3); 20 C.F.R. § 702.301(12).
>
> (2) *Situs* - the worker's injury must occur on navigable waters of the United States, or on a coterminous dry dock, pier, wharf, terminal, building way, marine railway "or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." *See* 33 U.S.C. § 903(a).

The parties have not contested jurisdiction in this case. Moreover, the Claimant has established that he was injured while working as a welder on a barge on the Ohio River. (TR 25; TR 106; CX 1 at 1). Accordingly, I find jurisdiction is proper in this case.

B. RESPONSIBLE EMPLOYER

For a claim to be compensable, under the Act, the injury must arise out of and in the course of employment. 33 U.S.C. § 902(2). Therefore, an employer-employee relationship must exist at the time of the injury. *Am. Stevedoring Ltd. v. Marinelli*, 248 F.3d 54 (2d Cir. 2001). Under the Act, an "employee" is defined as "any person engaged in maritime employment" and "employer" is defined as "an employer of any of whose employees are employed in maritime employment." 33 U.S.C. § 902(3), 902(4).

In this case, the parties have stipulated, and I find, that an employer-employee relationship existed between the Claimant and Employer at the time of the injury. Therefore, the named Employer is properly designated as the Responsible Employer.

C. TIMELINESS OF NOTICE

Section 912 sets out the requirements for timely notice to an employer of injury or death. 33 U.S.C. § 912. Generally, an employee has 30 days to provide notice, and the clock starts to

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[10] The law of the Circuit in which injury occurs is applicable. *Roberts v. Custom Ship Interiors*, 35 BRBS 65 (2001). Here, Sixth circuit law is applicable.

[11] The Board has distinguished "jurisdiction" from "coverage." *See Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 90 (1989) *accord Munguia v. Chevron USA, Inc.*, 999 F.2d 808 (5th Cir. 1993); *cert denied* 511 U.S. 1086 (1984); *Perkins v. Marine Terminals Corp.* 773 F.2d 1097, 1100 (9th Cir. 1982) *rev'g* 12 BRBS 219 (1980).

run when reasonable diligence would have disclosed the relationship between his injury and his employment. § 912(a); 20 C.F.R. § 702.212(a). Section 920(b) establishes a presumption that sufficient notice of the claim has been given. An employer may rebut the presumption by presenting substantial evidence that it did not have knowledge of the employee's work-related injury or death. *See Blanding v. Director, OWCP [Oldham Shipping]*, 33 BRBS 114(1999) *citing Stevenson v. Linens of the Week*, 688 F.2d 93, 98 (D.C. Cir. 1982). Failure to give timely notice may bar a claim.

In this case, the parties have stipulated, and I find, that the Employer received timely notice of the injury within the meaning of § 12 on April 28, 2003.

D. TIMELINESS OF CLAIM

A claim for medical benefits is never time-barred. *Colburn v. Gen. Dynamics Corp.*, 21 BRBS 219, 222 (1988). An employer has a continuing obligation to pay an injured employee's medical expenses, even if the claim for Section 8 compensation is time-barred by Section 12 or 13 of the Act. *Strachan Shipping v. Hollis*, 460 F.2d 1108 (5th Cir. 1972), *cert denied* 409 U.S. 887 (1972); *Wilson v. S. Stevedore Co.*, 1 BRBS 123 (1974).

Because this claim involves only a claim for medical treatment benefits, there is no issue concerning its timeliness.[12]

E. INJURY

Section 2(2) of the Act defines an "injury" as an accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. 33 U.S.C. § 902(2)*; see also U.S. Industries/Federal Sheet Metal, Inc, v. Director, OWCP*, 455 U.S. 608 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980).

The claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm, in order to establish his prima facie case. *Bolden v. G.A.T.X. Terminals Corp*., 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Md.*, 23 BRBS 157 (1990). In alternatively characterizing this burden, the Board also stated that a claimant must establish that: (1) he sustained physical harm or pain; and, (2) an accident occurred in the course of employment or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).[13] Credible complaints of subjective symptoms can be sufficient to establish the element of harm necessary for a *prima facie* case. *Welch v. Pennzoil Co.*, 23 BRBS 395, 401 (1990); *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1982).

[12] Moreover, I note that the parties have not raised timeliness of claim as an issue in the case.

[13] It should be noted that the Board, in *Kier*, did not require that a connection between the work and the harm be established at this stage. *Accord Kelaita v. Triple A Machine Shop*, 13 BRBS 326, 331 (1981).

Once the *prima facie* case is established, a presumption is created under Section 20(a) of the Act that the employee's injury arose out of his or her employment.[14] 33 U.S.C. § 920(a). Once the presumption is invoked, the party opposing entitlement must present specific and comprehensive medical evidence proving the absence of or severing the (presumed) causal connection between such harm and employment or working conditions. *Manship v. Norfolk & W. Ry. Co.,* 30 BRBS 175 (1996). If an employer does not offer substantial evidence to rebut the presumption, the presumption provided by section 20(a) will entitle the claimant to compensation. *See Del Vecchio v. Bowers*, 296 U.S. 280, 284-285 (1935); *Universal Mar. Corp. v. Moore* 126 F.3d 256, (4th Cir. 1997); *Duhagon v. Metro. Stevedore Co.*, 169 F.3d 615 (9th Cir. 1999). If the Administrative Law Judge finds the presumption is rebutted, it no longer controls and he must weigh all the evidence to resolve the causation issue based on the record as a whole. *Devine v. Atl. Container Lines*, 25 BRBS 15 (1991).

In this case, the parties have stipulated, and I find, that the Claimant sustained an accidental injury on or about April 28, 2003, while employed as a welder/laborer with the Employer and that the injury was within the course and scope of the that employment. Therefore, the Claimant has established that an "injury" within the meaning of the Act occurred.

At issue, however, is whether the Claimant has specifically established that he sustained a psychological or emotional injury as a result of his April 28, 2003 accident.[15] The evidence establishes that he has sustained such an injury.

The Claimant has established a *prima facie* case that he incurred psychological harm and that an accident occurred in the course of employment that could have caused the harm.

The Claimant has established the first prong of the *prima facie* case through both credible complaints of symptoms and medical evidence. With respect to the former, I find the Claimant's testimony concerning his emotional symptoms to be credible. Specifically, his testimony concerning feelings of anger, restlessness, and depression as well as troubles sleeping was corroborated by the testimony of other witnesses. It is also consistent with many of the symptoms he has reported to doctors during his various examinations.[16] Therefore, the Claimant's testimony supports that he has incurred psychological and emotional harm. This point is buoyed by the medical evidence in the record. To that end, Drs. Lance, Miller, and Ruth all agree, albeit to varying degrees, that the Claimant exhibits post-traumatic stress disorder. (CX 4; CX 7; EX 9). Mr. Given's vocational report also supports this conclusion. (CX 5 at 9).

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[14] This presumption applies only to the issue of whether an injury arises in the course of employment and, thus, is work-related; not to the issues of the nature and extent of disability. *Carlisle v. Bunge Corp*., 33 BRBS 133 (1999) *citing Jones v. Genco, Inc*., 21 BRBS 12 (1998).

[15] A psychological condition may present a discreet injury under the Act. *See Kelley v. Bureau of Nat'l Affairs*, 20 BRBS 169, 172 n.3 (1988).

[16] Indeed, the record does not support Dr. Ruth's assertion that the Claimant's account of his symptoms to him "differs considerably" from other accounts he has given. (*see* EX 9 at 1). The Claimant reported symptoms of forgetfulness, depression, and thoughts of suicide just as he did either at the hearing and/or to the other physicians. (EX 9 at 4). One notable exception is his denial of sleep disturbances to Dr. Ruth. (EX 9 at 4). However, given the consistency of the other symptoms presented to Dr. Ruth, when compared to his testimony and accounts given to other doctors, this exception does not negate the overall consistency with which the Claimant has described his symptoms over time.

Therefore, based on the combination of his own credible testimony and the medical evidence, the Claimant has established that he has incurred psychological and emotional harm.

With respect to the second prong of the *prima facie* case, it is undisputed that the Claimant experienced an accident in the course of employment that could have caused the harm.[17]

Therefore, the Claimant has established the *prima facie* case. The burden, therefore, shifts to the Employer to rebut the presumption with specific and comprehensive medical evidence sufficient to disprove the harm or sever the causal connection between the injury and employment. Here, the Employer has presented no such evidence. Indeed none of the medical reports disputes that the Claimant has post-traumatic stress disorder; rather the disagreements among them concerns the degree of the condition. Moreover, the Employer has speculated that the Claimant's mental state is attributable to his caffeine intake and other stressful life events. However, these postulations do not specifically demonstrate how the Claimant's mental condition was not caused by his employment injury. Moreover, no physician who examined the Claimant attributed his condition to these purported causes. Therefore, the Employer has not rebutted the Claimant's *prima facie* case.

Accordingly, the Claimant has established the element of "injury" as required by the Act.

F. DISABILITY

Because the parties have not raised the issue of Disability, I need not address whether and to what extend the Claimant was disabled by his injury.

G. MEDICAL EXPENSES AND BENEFITS

Section 7(a) of the Act provides that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a); *see also* 20 C.F.R. § 702.401. In order for a claimant to receive medical expenses, his injury must be work-related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). If an employer is found to be liable for the payment of compensation pursuant to an award of disability, it follows, in accordance with Section 7(a), that the employer is likewise liable for medical expenses incurred as a result of the claimant's injury. *Perez v. Sea-Land Servs*, *Inc.*, 8 BRBS 130, 140 (1978). However, an award of medical benefits is independent of an award for disability compensation under Section 8. *Union Stevedoring Corp. v. Norton*, 98 F.2d 1012 (3d Cir. 1938). Therefore, a claimant may be awarded medical benefits under Section 7(a) absent an award of disability compensation. *Weikert v. Universal Mar. Serv. Corp.*, 36 BRBS 38 (2002).

A claimant has established a *prima facie* case for compensable medical treatments when a physician finds treatment necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). In order for an employer to be liable for a

[17] *See Welch*, 23 BRBS at 401 for a finding that the claimant satisfied the second prong of the *prima facie* case for similar reasons.

claimant's medical expenses pursuant to Section 7(a), the expenses must be reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The employer must raise the issue of reasonableness and necessity of treatment. *Salusky v. Army Air Force Exch. Serv.*, 3 BRBS 22, 26 (1975). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. Gen. Dynamics Corp.*, 21 BRBS 219, 22 (1988); *Barbour v. Woodward & Lothrop, Inc*., 16 BRBS 300 (1984).

In this case, the Claimant has established that treatment is necessary for his work-related psychological disorder. Initially, he has established the *prima facie* case that treatment is necessary. Dr. Miller has documented extensively both the nature and degree of the Claimant's post-traumatic stress disorder, and related psychological conditions, and the impact this condition has on the Claimant's life. As a result, he concluded that treatment is necessary and documented a plan of treatment accordingly. (CX 7 at 13-15). He further stated that a delay in treatment is likely to complicate the Claimant's condition, thus emphasizing the necessity for treatment. (CX 7 at 13).

Moreover, the Employer has failed to sufficiently counter this showing. Dr. Ruth's opinion provides countervailing medical evidence as to the necessity of treatment. To that end, Dr. Ruth has opined that the Claimant suffers from post-traumatic stress disorder but stated that treatment is not necessary because the disorder is not of sufficient intensity to necessitate treatment. (EX 9 at 3). As support for this conclusion, Dr. Ruth stated that the Claimant reported to fewer symptoms than he reported to Dr. Miller, whom he acknowledged found a more severe condition. Dr. Ruth also cited the improvement that the Claimant has experienced and predicted, based on the progressive improvement often seen with this disorder, that the Claimant should continue to improve over time to a potential point of total resolution. Dr. Ruth was uncertain whether treatment would hasten this improvement.

This evidence is less persuasive than the report of Dr. Miller. First, while Dr. Ruth found treatment to be unnecessary, in part, due to a paucity of symptoms, his own report documents that the Claimant experiences anger, forgetfulness, depression, and uncertainty. (EX 9 at 4). Therefore, Dr. Ruth's conclusion rests upon a foundation not supported by his own report. Second, and related to the first point, Dr. Ruth did not provide an adequate explanation for why treatment is unnecessary for the symptoms he did cite. As noted above, Dr. Ruth stated that the Claimant should continue to improve based upon the improvement he previously experienced. However he has offered no explanation as to why the Claimant's prior improvement demonstrates that future improvement will occur. Thus, his opinion constitutes mere speculation. His conclusion that treatment is not necessary to hasten improvement is similarly unsupported. Merely stating that "[s]ometimes psychiatric treatment hastens improvement, and sometimes it does not" with no discussion of why treatment would not aid this particular Claimant is worthy of minimal weight in assessing the necessity of treatment.

Therefore, the Claimant has carried his burden of demonstrating that treatment is necessary for his work-related psychological injury, arising out of the April 28, 2003 accident. Accordingly, such treatment is compensable under Section 7 of the Act.

V. CONCLUSIONS

In this claim for medical treatment benefits under the Act, I find that the Claimant sustained a psychological and emotional injury as a result of his work-related accident on April 28, 2003. I further find that treatment is necessary for this condition and, thus the Employer is liable for all reasonable and necessary expenses incurred in this treatment.

VI. ATTORNEY'S FEES AND COSTS

Thirty (30) days is hereby allowed to the Claimant's counsel for the submission of such an application. *See* 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. Parties have fifteen (15) days following receipt of any such application within which to file any objections.

ORDER

Based on the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, it is hereby ORDERED that, pursuant to Section 7 of the Act, the Employer, shall furnish such reasonable, appropriate, and necessary medical care and treatment as the Claimant's psychological and emotional disorder arising out of his April 28, 2003 work-related incident referenced herein may require.

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RICHARD A. MORGAN
Administrative Law Judge

APPEAL RIGHTS: Appeals may be taken to the Benefits Review Board, U.S. Department of Labor, Washington, D.C. 20210, by filing a notice of appeal with the district director for the compensation district in which the decision or order appealed from was filed, within thirty (30) days of the filing of the decision or order, and by submitting to the Board a petition for review, in accordance with the provisions of part 802 of 20 C.F.R..

Notice of public hearing: By statute and regulation, longshore hearings are open to the public. 33 U.S.C. § 923(b); 20 C.F.R. § 702.344. Under e-FOIA, final agency decisions are required to be made available via telecommunications, which under current technology is accomplished by posting on an agency web site. *See* 5 U.S.C. § 552(a)(2)(E). *See also* Privacy Act of 1974; Publication of Routine Uses, 67 Fed. Reg. 16815 (2002) (DOL/OALJ-2). It is the policy of the Department of Labor to avoid use of the Claimant's name in case-related documents that are posted to a Department of Labor web site. Thus, the final ALJ decision will be referenced by the Claimant's initials in the caption and only refer to the Claimant by the term "Claimant" in the body of the decision. If an appeal is taken to the Benefits Review Board, it will follow the same policy. This policy does not mean that the Claimant's name or the fact that the Claimant has a case pending before an ALJ is a secret.